MARINA NAHULANDRAN v. APPIAH NAHULANDRAN & ANOR.

[O.C.J. (Arulanandom J.) May 13, 1975]
[Ipoh — Divorce Petition No. 25 of 1974]

Divorce — Custody of Children — Welfare of children the paramount consideration — Misconduct of guilty party — Joint property — Matrimonial home — Payment of reasonable compensation for contribution — Costs.

In this case the court had made an order for the dissolution of the marriage between the parties. Questions arose as to the custody of the children of the marriage and compensation for the joint property.

Held: (1) in deciding the custody of the children the paramount consideration is the welfare of the children;

(2) in this case although the respondent was the guilty party the evidence showed that he was genuinely fond of the children and that he will do everything possible for both the children;

(3) in the circumstances of this case the custody of the younger son would be given to the respondent, but as the elder child was studying in Taiping, where the petitioner lived, he would be left in the custody of the petitioner;

(4) the respondent should give the petitioner reasonable compensation (assessed at $30,000) for her contribution to the purchase of the house, which was used as the matrimonial home.

[Editorial Note: The petitioner appealed to the Federal Court (Federal Court Civil Appeal No. 50 of 1975). The Federal Court (Gill C.J. (Malaya), Ali and Wan Suleiman F.JJ.) allowed the appeal on September 11, 1975 and ordered *inter alia* the order of Arulanandom J. should be varied as follows:—

(a) that custody, care and control of both the children namely Justin Rabindra and Dustin Rabindra be granted to the appellant;

(b) that the respondent do pay to the appellant a sum of Ringgit One hundred and fifty ($150) per month as maintenance for both the children;

(c) that the respondent shall have access to both the children at all times;

(d) that the house No. 29 Tamban Heights, Tamban be sold by public auction with a reserve price of Ringgit Sixty thousand ($60,000) with liberty to both the appellant and the respondent to bid at such auction and the proceeds thereof be divided between the appellant and the respondent in the proportion of sixty (60%) percent to the appellant and forty (40%) percent to the respondent.

However no written judgment was delivered by the Federal Court.]

DIVORCE.

H. R. Sankey for the petitioner.

Yeow Khoon Kwong for the respondent and co-respondent.

Arulanandom J.: This was a petition for divorce by a wife against her husband on the grounds of adultery. The petition was uncontested as far as the divorce was concerned but although the evidence was short it was abundantly clear that the marriage had broken down irretrievably and as a result of lack of affection and consideration shown by the wife the husband had fallen in love with the woman-named and after a protracted affair had decided to start and make a new life and home with her, and was happy in his new life. Under the circumstances the court made the usual order for dissolution of marriage by a decree nisi to be made absolute in three months.

The court adjourned all the other questions before the court including prayers for damages, custody of children, maintenance, division of joint property and costs to chambers. At that stage under the mistaken assumption that both the children were being looked after by the petitioner, the court ordered interim custody of the two children of the marriage, Justin aged 8½ years and Dustin aged 5½ years to the petitioner until further order of court. Subsequently it was brought to the court's notice that while Justin was staying in the home of the petitioner's family in Taiping, Dustin was with the respondent in Ipoh. At the next hearing in chambers the court set aside the interim order December 9, 1975 and made another interim order granting custody of Justin to the petitioner and Dustin to the respondent.

When the matter came up in chambers subsequently the court had to decide on all the other prayers in the petition *viz.* (b) to (g):—

(b) that the petitioner may be granted custody of the said children of the marriage.

(c) that the petitioner may have such alimony pending suit and thereafter maintenance as may be just and such maintenance for the said children as may be just and such lump sum as may be just.

(d) that a just and equitable arrangement be made in respect of the house in Tambun Heights jointly purchased by the petitioner and the respondent.

(e) that a just and equitable arrangement be made in respect of the petitioner's contribution in the fish and animal breeding business carried on at 5½ milestone Kuala Kangsar by the respondent and others.

(f) that the respondent and co-respondent may be condemned in the costs of this suit and

(g) that the said co-respondent be condemned in the sum of $20,000 as damages in respect of the adultery by her committed with the respondent.

In the course of the hearing counsel for the petitioner applied to withdraw prayer (g) with liberty to file separate proceedings if desired. The court allowed withdrawal but refused leave to file separate proceedings against the woman-named. (It is to be noted that in line with modern legalistic and humanistic trends the Law of England is being amended to exclude all such claims).

Custody

As far as custody of children is concerned, it is settled law that the paramount consideration is the welfare of the child. The likes of the parents unless expressed in a negative form are secondary. From what was submitted in court and not contradicted by the parties concerned the children from birth were brought up by the respondent's mother till they were about 2 years old, even when the petitioner was staying with the respondent in Ipoh. Even at present the elder boy is staying in Taiping with the family of the petitioner. When spoken to alone in the chambers he struck me as an impressive and intelligent boy and he was clean, well-kept and spoke well. But to all detailed questions about his home life, *e.g.* who looks after you, bathes you, clothes you, feeds you and takes care of you when you are sick, his answer was invariably "Aunty" and

"mummy". Although when asked about his mummy, he said he liked his mummy and daddy. His daddy used to play with him at home and teach him. He was going to school in Taiping. (Note: In order to maintain a friendly and informal atmosphere in chambers there was no recording of evidence while I was chatting with the child — only a few notes were made later.) This appears consistent with the complaint of the respondent that the petitioner confined herself to the room and was indifferent to the social side of family affairs, did not cook and did not show affection. In considering the question of the boy's custody the court placed his welfare as the paramount consideration Counsel for the petitioner urged on me that a guilty party should not be given any consideration at all. This may have been valid in the dark ages when adulterers were even stoned and adulteresses put to death. In the enlightened years of today this court does not hold that a spouse who commits a matrimonial offence, whether the spouse is male or female forfeits all his legal, civil and human rights. A father quo father has as much right to custody of a child as the mother, subject to the consideration for the welfare of the child. Spouses who commit matrimonial offences expose themselves to divorce proceedings and there it ends and should end. Otherwise they remain perfectly ordinary human beings with all the attributes and weaknesses of human beings. They do not become social outcasts or lepers. But while the court, because of the personal interest shown in both children by the respondent and their affection for him would have been inclined to grant custody of both the children to the respondent the court had to take into consideration that Justin was schooling in Taiping and appeared settled and happy and in the circumstances the court decided to leave him where he was in the custody of the petitioner. Had he been schooling in Ipoh and staying with the respondent, this court would have decided that it was in the best interests of Justin to remain in the custody of his father.

Dustin, the younger boy was also intelligent, impressive, clean and well-kept and well-spoken. By his talk he was very attached and fond of his father. His father looked after him, played with him and was good to him. When asked with whom he would like to stay, he was positive he wanted to stay with daddy. He also liked mummy but did not appear very enthuiastic. But he was far more enthuiastic about "Auntie" (referring to the woman-named). She bathed him, dressed him, fed him, played with him and the boy seemed to have an emotional attachment to her. He does not miss his mother. In view of the fact that the respondent and woman-named intend to get married after the decree nisi is made absolute the court considered in the best interests of the child to give custody to the father and let him remain where he was. He struck me as settled, contented and happy. To forcibly move him from his father would not be in his best interest.

Hence the order for custody of Dustin Rajendran to the respondent.

It was argued before me that the children should not be separated. The court sees no merit in that argument. The very fact they are separated will enable them during periods when the right of access is exercised to remember who their real parents are and not to completely forget them. This will further ensure that both the petitioner and the respondent will respect and comply with the order for access which in the experience of these courts is flouted by many indirect means, physical, tactical and emotional. In fairness to the respondent, and from his demeanour, conduct and attitude in these proceedings, this court is satisfied he is genuinely fond of both the children and this court is satisfied that he will do everything possible for both the children and will endeavour to attend to their welfare. But on the contrary, by the demeanour of the petitioner, the court finds it difficult not to accept that the petitioner is an indifferent type of person perhaps brought up in comfort and receiving everything and not accustomed to giving and thus lacking in consideration and affection for those who need and deserve them.

Another decision the court had to make was about the house in Tambun Heights jointly purchased by the petitioner and the respondent. Here there was no evidence of any substance. There was no documentary evidence at all. Oral evidence was unsatisfactory. This is understandable as the parties purchased the house when they lived in happier circumstances, when there was mutual faith and trust in each other and lot of give and take. From the agreed statement from both counsel I accepted that the total contributed by both parties towards the house was $40,924.99 and that the petitioner contributed 60% and the respondent 40%. Counsel for the petitioner submitted the house was worth $75,000. This was a bare statement. There was no valuation report and no basis on which this figure could have been built up. It appeared to me to be founded on the petitioner's attitude that as the respondent was the guilty party, she should have the pound of flesh! It should be remembered that the house was bought with the intention of the parties living in it. Unfortunately, intervening circumstances have made this impossible for them to live together. It was not bought as a business proposition. The respondent and one child are staying in it. The petitioner is staying with her family in Taiping. Just because the marriage has broken up there is no reason to oust the respondent and one child from the house. As long as the respondent gives the petitioner reasonable compensation for her contribution to its purchase the ends of justice will be served.

Taking into account the fact that the first child as a result of access by the father would also visit the house and all other circumstances into consideration the court assessed 60% of the value of the house at $30,000 and it is the opinion of this court that this is a just and fair compensation. The court therefore ordered accordingly. In view of the fact that the respondent was a government servant the court allowed him six months to pay this amount to the petitioner.

The court condemned the respondent in costs.

Order accordingly.

Solicitors: *H. R. Sankey & Co.; Yook Woon & Yeow.*